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No. 94-2009

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM M. GURLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that an earlier action under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, in which petitioner was not a party, did not preclude a subsequent action against petitioner under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 43 F.3d 1188. The district court's memorandum and order entering judgment against petitioner (Pet. App. A52-A81) is reported at 788 F. Supp. 1473. The district court's memorandum and order granting partial summary judgment against petitioner (Pet. App. A30-A51) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1994. A petition for rehearing was denied on March 9, 1995. Pet. App. A83. The petition for a writ of certiorari was filed on June 6, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, establishes a uniform framework for addressing the problem of inactive hazardous-waste sites throughout the United States. "CERCLA both provides a mechanism for cleaning up hazardous-waste sites, 42 U.S.C. §§ 9604, 9606 * * *, and imposes the costs of the cleanup on those responsible for the contamination, § 9607." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989). The President's authority under CERCLA, most of which has been delegated to the Environmental Protection Agency (EPA), includes the power to compel cleanup actions by responsible parties or to undertake a federal response and recover expenses from responsible parties. 42 U.S.C. 9604, 9606-9607 (1988 & Supp. V 1993); see also *United States* v. *Ottati & Goss, Inc.*, 900 F.2d 429, 433 (1st Cir. 1990) (describing federal response options). "CERCLA places the ultimate responsibility for clean up on 'those responsible for problems caused by the disposal of chemical poisons,'" by authorizing the United States, as well as any other party that incurs eligible response costs, to recoup expenses through cost-recovery actions against liable parties identified in Section 107(a) of CERCLA, 42 U.S.C. 9607(a). *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989) (quoting *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986)); accord *Kaiser Aluminum & Chem. Corp.* v. *Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992).

Liability under Section 107(a) extends to several classes of responsible parties, including persons who have owned or operated facilities at times when hazardous substance disposal occurred. "Persons" liable under Section 107(a)(2) include individuals who operate hazardous-waste facilities on behalf of corporations.[1]

1. Petitioner is president and principal shareholder of the Gurley Refining Company, Inc. (GRC or the Company). For several years, ending in 1975, GRC re-refined used oil at a plant in West Memphis, Arkansas. Pet. App. A3, A30-A31. Wastes from the re-refining process contained barium, lead, zinc, polychlorinated biphenyl compounds (PCBs), and sulfuric acid, all of which are classified as hazardous substances under CERCLA, 42 U.S.C. 6903(5); 40 C.F.R. 116.4. Pet. App. A3. In 1970, after state regulators ordered GRC to cease discharging its wastes into the Mississippi River and other Arkansas waterways, GRC negotiated a lease with R.A. Caldwell to dispose of its wastes on Caldwell's property near Edmondson, Arkansas. *Ibid.*

The disposal site, known as the Gurley Pit, is located about 200 yards from Fifteen Mile Bayou, a tributary of the St. Francis and Mississippi Rivers. Pet. App. A31. In 1975, shortly after GRC was convicted in state court for illegally pumping contam-

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[1] See, *e.g.*, *Sidney S. Arst Co.* v. *Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985); see also *Riverside Market Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.) (corporate officers personally liable if they qualify as CERCLA operators), cert. denied, 502 U.S. 1004 (1991).

inated water from the pit (*id.* at A56-A57; U.S. C.A. App. 6), the Company altered its operations to cease generating the acidic sludge and contaminated filtering material that it had been sending to the Gurley Pit (U.S. C.A. App. 8, 72-74). GRC then closed the pit and terminated its lease. Pet. App. A3. Problems with releases of hazardous substances at the site continued, however. Overflows of contaminated water from the Gurley Pit occurred in 1978 and 1979, polluting nearby surface water and damaging wildlife habitat. *Ibid.*

2. In early 1978, federal and state inspectors notified GRC and site-owner Caldwell that a discharge had occurred and asked them to take prompt action to clean up and contain the wastes. When GRC and Caldwell failed to act, EPA performed the work pursuant to its limited removal authority under Section 311 of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. 1321 (1988 & Supp. V 1993). See Pet. App. A3, A31. In spite of EPA's initial CWA response, however, heavy rains in April 1979 caused a second overflow. During the second incident, nearly 500,000 gallons of oily wastes were released from the Gurley Pit, triggering a second round of EPA containment, cleanup, and disposal efforts pursuant to the CWA. *Id.* at A5, A31, A57.

In late 1983, the United States filed suit against Caldwell and GRC under Section 311(f)(2) of the CWA, seeking to recover the costs of the federal cleanup efforts. In October 1985, the district court granted the United States' cost-recovery claim. *United States* v. *Caldwell*, No. J-C-83-399 (E.D. Ark. Oct. 30, 1985) (*reprinted in* Pet. C.A. Br. Adden. 37-45). The district court ruled that GRC and Caldwell

were jointly and severally liable under Section 311(f)(2) for response costs totalling $76,758.60, and that GRC was responsible for Caldwell's share under the terms of an earlier indemnification judgment. Slip op. 8-9 (Pet. C.A. Br. Adden. 44-45). There was no appeal.

3. Following its initial cleanup and containment actions under the CWA, EPA acted, pursuant to its broader response authority under CERCLA, to implement a more permanent remedy for the persistent environmental threats posed by the Gurley Pit. EPA added the pit to its National Priorities List for CERCLA cleanups in August 1983 (Pet. App. A4, A58), and in May 1985, the agency completed a Remedial Investigation that provided a detailed evaluation of the nature and magnitude of the threat (*id.* at A58). In April 1986, EPA completed a Feasibility Study that evaluated alternative approaches to the containment of remaining wastes. The approach adopted by EPA called for stabilization of contaminated sludges and soils, followed by on-site disposal in a secure landfill. *Id.* at A58-A59.

4. In November 1987, the United States filed the present action under CERCLA to establish liability for the Gurley Pit remedy and to recover its response costs. GRC and petitioner were among the defendants. The complaint sought reimbursement for response costs already incurred under CERCLA, and a declaration that the defendants also would be liable for future costs. On June 14, 1990, the district court entered a final opinion and order disposing of a number of issues in advance of trial. Pet. App. A30-A51. The order rejected arguments by GRC and petitioner that the judgment in *United States* v. *Caldwell*, the earlier CWA action, barred the

CERCLA claims against them under principles of claim preclusion. *Id.* at A37-A38. The court ruled that the CWA and CERCLA actions were distinct for claim preclusion purposes and that, in any event, CERCLA specifically authorizes successive cost-recovery actions. *Ibid.*; see also *id.* at A64 (reaffirming claim preclusion ruling in later order). In March 1992, following a bench trial, the court entered an opinion and order rejecting the defendants' remaining liability defenses and their challenges to EPA's cost claims. *Id.* at A52-A81. The court found GRC, petitioner, and defendant Larry Gurley jointly and severally liable for the United States' past and future CERCLA response costs at the Gurley Pit.

5. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. A1-A29. A majority of the panel agreed with GRC's contention that the United States' CERCLA suit pressed the "same cause of action" against GRC that had been decided against the Company in *United States* v. *Caldwell*. The majority rejected the United States' arguments that its CWA and CERCLA claims should be considered distinct for claim preclusion purposes, and that Section 113(g)(2) of CERCLA, 42 U.S.C. 9613(g)(2), removed any common law restrictions on claim splitting as a bar to its CERCLA action. Section 113(g)(2), the majority concluded, is strictly limited to successive *CERCLA* actions for the recovery of CERCLA response costs. Pet. App. A17-A18. Accordingly, the majority reversed the district court's imposition of CERCLA liability on GRC.[2]

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[2] Judge Gibson, in partial dissent, argued that the United States' CERCLA claim against GRC could not properly have been raised in the CWA litigation and, therefore, could not be

The court of appeals unanimously upheld the CERCLA judgment against petitioner, rejecting his contention that the United States' CERCLA claim was similarly precluded as to him. The court first observed that, because petitioner was not a party to the earlier CWA action (in which GRC and Caldwell were defendants), he could assert the defense of *res judicata* "only if he is a 'privy' to GRC." Pet. App. A19-A20 (citing *Montana* v. *United States*, 440 U.S. 147, 153 (1979)). As a "general rule," the court added, "[c]orporations are treated as entities separate from their officers, directors, and shareholders for purposes of preclusion just as for other purposes." *Id.* at A20 (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4460, at 533 (1981)). The court acknowledged a limited exception to that rule, under which corporate agents and owners who are "named as defendants solely in their [corporate] capacity" may assert a claim preclusion defense based on an earlier judgment against the corporation. *Ibid.* (internal quotation marks omitted). The court concluded, however, that it was "undisputed" that the district court had found petitioner liable "not in his capacity as principal shareholder, president, and director, but as an individual who meets [CERCLA Section 107(a)(2)]'s definition of 'operator.'" *Ibid.* Accordingly, the court of appeals ruled, the CWA judgment against GRC

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barred by that litigation's preclusive effect. The dissent observed that the United States' CERCLA response at the Gurley Pit was in its early stages when the CWA action concluded, and that statute-of-limitations concerns had required the filing of the CWA action before the dimensions of the CERCLA response were known. Pet. App. A28-A29.

could not protect petitioner from the personal liability that he incurred under CERCLA by acting as an "operator" of the Gurley Pit.

ARGUMENT

The court of appeals correctly determined that the CWA suit, to which petitioner was not a party, did not bar the present CERCLA action as to petitioner. The court's ruling against petitioner, moreover, turns largely on the facts of this case and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 20) that the court of appeals erred by considering, in ruling on petitioner's claim preclusion defense, legal arguments first raised by the United States in its brief as appellee. That contention lacks merit. "[A] prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); see also *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970). Accordingly, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976). There is no indication that the court of appeals abused its discretion in this case, and, in any event, the court's case-specific action on this issue does not warrant this Court's review.

2. Petitioner also contends (Pet. 21-30) that the court of appeals implicitly resolved disputed factual matters against him in determining (1) that the district court had found him liable under CERCLA

Section 107(a)(2) in his personal capacity rather than as a representative or agent of GRC, and (2) that petitioner was not entitled to share GRC's claim preclusion defense on the basis of privity with the Company. Each of those issues was properly resolved by the court of appeals.

a. As the court of appeals correctly observed (Pet. App. A20), it was "undisputed" before that court "that the district court imposed liability on [petitioner] not in his capacity as principal shareholder, president, and director, but as an *individual* who meets [CERCLA Section 107(a)(2)]'s definition of 'operator.'" (Emphasis added).[3] In response to the United States' argument (U.S. C.A. Br. 20) that petitioner was sued "in his personal capacity" and, therefore, could not claim privity with GRC, petitioner argued only that the law in fact recognized privity as to those in his position (*e.g.*, Pet. C.A. Reply Br. 11, 23); he nowhere disputed that he had been sued in his personal capacity. Having found the personal nature of the CERCLA claim against petitioner to be undisputed, the court of appeals properly resolved that issue in the United States' favor.

In any event, the pleadings and orders in this case unequivocally demonstrate that petitioner was sued and adjudged liable under Section 107(a) of CERCLA

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[3] CERCLA's imposition of personal liability for such conduct "'is distinct from the derivative liability that results from "piercing the corporate veil"' where [courts] hold the owners of a less than bona fide corporation responsible for corporate acts." *Riverside Market Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.) (quoting *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 744 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987)), cert. denied, 502 U.S. 1004 (1991).

in his personal capacity, based on his role in the creation and operation of the Gurley Pit. The United States' complaint in the CERCLA action alleged that "William Gurley, at all times relevant herein, was responsible for the conduct and management of the Gurley site" (Pet. App. A86), and petitioner's second amended answer responded by denying that "William Martin Gurley, *in his individual capacity*, was at any time responsible for the conduct and management of the Gurley Site" (*id.* at A96 (emphasis added)). The personal nature of the claim against petitioner is similarly evident from the district court briefs and orders. See, *e.g.*, U.S. Motion for Partial Summary Judgment 15-19 (June 29, 1989) (ascribing liability to petitioner under CERCLA authority holding "that corporate officials who participate in the day-to-day activities of hazardous waste disposal are personally liable"). The court of appeals correctly determined that the United States' CERCLA claim against petitioner went to his status as an individual "operator" subject to liability under Section 107(a)(2) of CERCLA by virtue of his own conduct, not to his status as a representative of GRC.

b. Petitioner also contends (Pet. 23-24) that the court of appeals improperly prevented him from developing facts demonstrating that he was in privity with GRC in the CWA action. According to petitioner, evidence of a close relationship between his interests and the interests of GRC at the time of the CWA action would establish the viability of his claim preclusion defense to CERCLA liability, regardless of the capacity in which he was sued and adjudged liable under CERCLA.

Petitioner's assertions regarding allegedly undiscovered facts are not pertinent. As discussed above,

United States v. *Caldwell*, the CWA judgment against GRC and the owner of the Gurley Pit, imposed no personal liability on petitioner. Petitioner was neither named in his individual capacity as a violator of the CWA, nor pursued individually under a theory that GRC functioned as his alter ego. Accordingly, petitioner's alleged de facto participation in the CWA litigation—and his status as director, officer, and shareholder—could shield him only from subsequent litigation in which he is named in his capacity as a representative of the Company. See 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4449, at 414 (1981) ("participation in a prior action in one legal capacity should not preclude relitigation of the same issues in a different legal capacity"); see generally 1 Restatement (Second) of Judgments § 36, at 359 (1982) (same). The personal defense petitioner seeks to assert in this case is foreclosed by the claim preclusion doctrine's well-established requirement of mutuality. 18 C. Wright, et al., *Federal Practice and Procedure*, *supra*, § 4464, at 588 (discussing the "general assumption" that nonmutual claim preclusion "is not ordinarily available").

Contrary to petitioner's contention (Pet. 17, 30), the court of appeals' decision that, in the absence of mutuality, petitioner could not assert the preclusive effect of the prior action against GRC, is consistent with this Court's decisions. As the Court has stated, "[w]hile mutuality has been for the most part abandoned in cases involving collateral estoppel, it has remained a part of the doctrine of res judicata." *Nevada* v. *United States*, 463 U.S. 110,

143 (1983) (citations omitted).[4] Accord, *e.g.*, *Sidag Aktiengesellschaft* v. *Smoked Foods Prods. Co.*, 776 F.2d 1270, 1275 (5th Cir. 1985) ("identity, or 'mutuality' is in this circuit clearly a prerequisite to the broad bar of relitigation that characterizes claim preclusion"); *Headley* v. *Bacon*, 828 F.2d 1272, 1276-1279 (8th Cir. 1987) ("litigation involving officials in their official capacity does not preclude relitigation in their personal capacity"); *Roy* v. *City of Augusta*, 712 F.2d 1517, 1521 (1st Cir. 1983) (same).

Petitioner's contention (Pet. 23) that, if given the opportunity, he would demonstrate that he "participated in and dominated the litigation in the first proceeding," confuses claim preclusion principles with the doctrine of issue preclusion. Such evidence might be used to establish, under issue preclusion principles, that petitioner is bound by, and entitled to the benefit of, the court's resolution of issues adjudicated in *United States* v. *Caldwell*. See, *e.g.*, *Drier* v. *Tarpon Oil Co.*, 522 F.2d 199, 200 (5th Cir. 1975). Because direction of GRC's defense in the

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[4] The *Nevada* decision recognized an exception to the usual requirement of mutuality in the claim preclusion context. There, water users who had not participated in an earlier water rights adjudication were permitted to invoke that judgment as a bar to the United States' attempt to relitigate the same rights. That result, however, "obtained in the unique context of 'a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to.'" *United States* v. *Mendoza*, 464 U.S. 154, 163 n.8 (1984) (quoting *Nevada*, 463 U.S. at 143). Petitioner here cannot invoke the exceptionally strong reliance interests and expectations of finality that gave rise to the narrow exception to the mutuality requirement recognized in *Nevada*.

CWA action could not have given rise to any risk of personal liability for petitioner,[5] however, evidence as to his role in that litigation could not correct the nonmutuality problem that defeats his claim preclusion defense. See *Montana* v. *United States*, 440 U.S. 147, 154 (1979) (preclusion applicable to nonparties as a result of their control of earlier litigation "falls under the rubric of collateral estoppel [issue preclusion] rather than res judicata [claim preclusion] because the latter doctrine presupposes identity between causes of action"); 1B J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 0.411[6], at III-249 to III-250 (1995) (to the same effect).[6]

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[5] Petitioner cites *In re Teltronics Services, Inc.*, 762 F.2d 185 (2d Cir. 1985), for the proposition that direction of GRC's defense in *United States* v. *Caldwell* bound him in his personal capacity to the judgment in that action and entitles him now to invoke its preclusive effect. See Pet. 14 n.10. In *Teltronics*, a corporation president, a participating nonparty in earlier litigation initiated by his corporation, sought to relitigate issues that the corporation had lost. The corporation president was precluded from reasserting "the same cause of action" that the corporation had asserted at his direction. 762 F.2d at 192. The decision contains no suggestion that a judgment on claims asserted against the corporation in the initial action would have been treated as binding on the company president in his personal capacity.

[6] To the extent that petitioner's assertion that GRC functioned as his "alter ego" (Pet. 12 n.8, 23, 31) is intended to suggest an alternative cure for the nonmutuality problem, it is similarly without merit. If petitioner had incurred personal liability *in the CWA action* on an alter-ego or "veil piercing" theory, an argument might have been made that the United States was obliged to raise its claim against petitioner under Section 107(a)(2) in conjunction with its CWA claims. Although we do not believe that such an argument would be correct, petitioner is not in a position to make it. Absent notice that the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1995

United States sought to impose personal liability under an alter-ego or "veil piercing" theory in the CWA action, the judgment there could not create personal liability. See, *e.g.*, 2 Restatement (Second) of Judgments § 59(5), at 95 (1982) (a judgment against a corporation that functions as the alter ego of an individual imposes personal liability on that individual only if the individual receives "notice that such liability is sought to be imposed and fair opportunity to defend the action resulting in the judgment").